

ESTTA Tracking number: **ESTTA1174050**

Filing date: **11/22/2021**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	88359361
Applicant	Layla Sleep, Inc.
Applied for Mark	FLIPPABLE FIRMNESS
Correspondence Address	WALTER B. WELSH WELSH IP LAW LLC PO BOX 1267 DARIEN, CT 06820 UNITED STATES Primary Email: trademark@welshiplaw.com 203-321-6303
Submission	Applicant's brief
Attachments	Appeal Brief.pdf(2616206 bytes)
Appealed class	Class 035. First Use: 2020/04/30 First Use In Commerce: 2020/04/30 All goods and services in the class are appealed, namely: Online retail store services featuring bed frames, foundations, mattresses, pillows, toppers, and bed sheets
Filer's Name	Walter B. Welsh
Filer's email	walter@welshiplaw.com, trademark@welshiplaw.com
Signature	/Walter B. Welsh/
Date	11/22/2021

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re Layla Sleep, Inc.,

Applicant.

:
:
:
:
:
:
:

Application Serial No. 88359361
FLIPPABLE FIRMNESS

Appeal Brief

TABLE OF CONTENTS

I.	STATEMENT OF ISSUES	1
II.	INTRODUCTION	1
III.	STATEMENT OF RELEVANT FACTS.....	1
VI.	LEGAL SECTION	4
V.	ARGUMENT	4
A.	There is a Direct Association Between FLIPPABLE FIRMNESS and the Online Retail Services in the Substitute Specimen.....	4
B.	There is a Direct Association Between FLIPPABLE FIRMNESS and the Online Retail Services in the Original Specimen.	7
C.	Third Party Registrations Confirm that Consumers Will Perceive A Direct Association Between the Mark and Retail Services.....	10
VI.	CONCLUSION	14

TABLE OF AUTHORITIES

Cases

<i>In re Adair</i> , 45 USPQ2d 1211 (TTAB 1997).....	4
<i>In re Aid Laboratories, Inc.</i> , 221 USPQ 1215 (TTAB 1983).....	7
<i>In re Benthin Management GmbH</i> , 37 USPQ2d 1332 (TTAB 1995).....	7
<i>In re DNI Holdings Ltd.</i> , 77 USPQ2d 1435 (TTAB 2005).....	7
<i>In re DSM Pharms., Inc.</i> , 87 USPQ2d 1623 (TTAB 2008).....	4
<i>In re Eagle Crest</i> , 96 USPQ2d 1227 (TTAB 2010).....	11
<i>ICE Futures U.S. Inc.</i> , 85 USPQ2d 1664 (TTAB 2008).....	3
<i>In re In Over Our Heads Inc.</i> , 16 USPQ2d 1653 (TTAB 1990).....	7
<i>In re International Taste Inc.</i> , 53 USPQ2d 1604 (TTAB 2000).....	7
<i>In re Johnson Controls, Inc.</i> , 33 USPQ2d 1318 (TTAB 1994).....	3
<i>In re MC MC S.r.l.</i> , 88 USPQ2d 1378 (TTAB 2008).....	7
<i>In re Metriplex, Inc.</i> , 23 USPQ2d 1315 (TTAB 1992).....	3
<i>In re Nett Designs Inc.</i> , 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001).....	11
<i>In re Pitney Bowes, Inc.</i> , 125 USPQ2d 1417 (TTAB 2018).....	4

<i>In re Red Robin Enters.</i> , 222 USPQ 911 (TTAB 1984)	3
<i>In re Sunmarks, Inc.</i> , 32 USPQ2d 1470, 1472 (TTAB 1994)	11
<i>In re Universal Oil Prods. Co.</i> , 476 F.2d 653, 177 USPQ 456 (CCPA 1973)	3,6
<i>In re WAY Media, Inc.</i> , 118 USPQ2d 1697 (TTAB 2016)	3

Statutes and Rules

15 U.S.C. § 1051	3
37 C.F.R. § 2.56(b)(2)	3
TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP), § 1301.04 (July 2021)	4,8

I. STATEMENT OF ISSUES

1. Whether the substitute specimens, two advertisements, show the applied-for mark “FLIPPABLE FIRMNESS” used in association with “online retail store services featuring bed frames, foundations, mattresses, pillows, toppers, and bed sheets?
2. Whether the original specimen, a digital image of a webpage, show the applied-for mark “FLIPPABLE FIRMNESS” used in association with “online retail store services featuring bed frames, foundations, mattresses, pillows, toppers, and bed sheets?

II. INTRODUCTION

In accordance with the provisions of 37 C.F.R. § 2.141 and 2.142, Applicant hereby appeals to the Trademark Trial and Appeal Board from the decision of the Trademark Examining Attorney denying registration of the mark FLIPPABLE FIRMNESS, Serial No. 88359361, by refusing the specimen submitted for Class 35, retail store services. Applicant respectfully requests that the Board reverse the Examining Attorney’s refusal.

The Applicant has concurrently submitted the Declaration of Gregg Dean in support of its Appeal. This Declaration includes a summary of the information submitted during prosecution and does not include new information or facts.

III. STATEMENT OF FACTS

Applicant is a direct-to-consumer e-commerce company that sells mattresses and related products through its online retail store at www.laylasleep.com (“Applicant’s Online Retail Store”). Applicant does not have a physical store or any other location where customers can view or purchase its products.

On March 27, 2019, Applicant filed application serial no. 88981478 to register the mark FLIPPABLE FIRMNESS under Sec. 1(b) in connection with the following goods and services:

IC 020: Mattresses; pillows; mattress toppers

IC 035: Online retail store services featuring bed frames,

foundations, mattresses, pillows, toppers, and bed sheets

On October 15, 2019, the Office issued a Notice of Allowance for the application to register the mark in both classes.

On July 20, 2020, Applicant submitted a statement of use and a verified specimen for mattresses in Class 20. The Applicant deleted pillows and mattress toppers in Class 20. The Applicant submitted a statement of use and a verified specimen the online retail stores services in Class 35.

In an Action of Mar 1, 2021, the Office stated that the specimen was acceptable for the Class 20 goods. The Office refused to register the applied-for mark in Class 035 because the specimen failed to associate the applied for mark with the applicant's Class 35 services.

The Applicant filed a Requested to Divide the Class 20 goods on April 27, 2021. The Office subsequently issued registration No. 6,382,050 for FLIPPABLE FIRMNESS in connection with the Class 20 goods. The Office assigned application serial number 88359361 to the pending request to register the services in Class 35.

On September 1, 2021, the Applicant filed a Request for Reconsideration after Final Action. The Applicant submitted a new statement of use and a verified substitute specimen. The substitute specimen included:

- A screen capture of a sponsored advertisement on Google.com rendered on a Google Chrome browser operating on a MacBook computer.
- A screen capture of a sponsored advertisement on Google.com rendered on a Safari browser operating on iOS on an iPhone.
- Additional screen captures of the Applicant's Online Retail Store.

The Office denied the requested for reconsideration because the substitute specimens, including the Google search results, fails to show that the applied-for mark, "FLIPPABLE FIRMNESS," is used in association with "online retail store services featuring bed frames, foundations, mattresses, pillows, toppers, and bed sheets." The Applicant held a telephone

conference with the Examiner on or about September 23, 2021. During the call, the Applicant sought to reinforce that the substitute specimen was an advertisement, and not merely a such result. During the call, the Examiner confirmed that she understood this and she stated that the advertisement did not show use in commerce because it failed to show the applied for mark in association with the Class 35 services. The telephone conference was not previously made of record.

IV. LEGAL SECTION

Under Section 45 of the Trademark Act, a service mark is used in commerce “when it is used or displayed in the sale or advertising of services.” *See also* Trademark Rule 2.56(b)(2), 37 C.F.R. § 2.56(b)(2) (“A service mark specimen must show the mark as used in the sale or advertising of the services.”). Use of a service mark may be established by: (1) showing the mark used or displayed as a service mark in the sale of the services, which includes in the course of rendering or performing the services, or (2) showing the mark used or displayed as a service mark in advertising the services, which encompasses marketing and promotional materials. *In re WAY Media, Inc.*, 118 USPQ2d 1697, 1698 (TTAB 2016); *see also In re ICE Futures U.S. Inc.*, 85 USPQ2d 1664, 1669 (TTAB 2008) (noting that use in the rendition of services is an element of the “sale” of services under Section 45 of the Trademark Act); *In re Metriplex, Inc.*, 23 USPQ2d 1315, 1316-17 (TTAB 1992) (explaining that an acceptable specimen need not explicitly refer to the services if it “show[s] use of the mark in the rendering, i.e., sale, of the services”); *In re Red Robin Enters.*, 222 USPQ 911, 914 (TTAB 1984) (stating that “rendition” of services is properly viewed as an element of the “sale” of services).

An acceptable specimen must display use of the mark in a manner such that potential purchasers would perceive “some direct association between the offer of services and the mark sought to be registered therefor.” *In re Universal Oil Prods. Co.*, 476 F.2d 653, 177 USPQ 456, 457 (CCPA 1973); *WAY Media*, 118 USPQ2d at 1698. Specimens showing the mark used in rendering the identified services need not explicitly refer to those services, but “there must be something

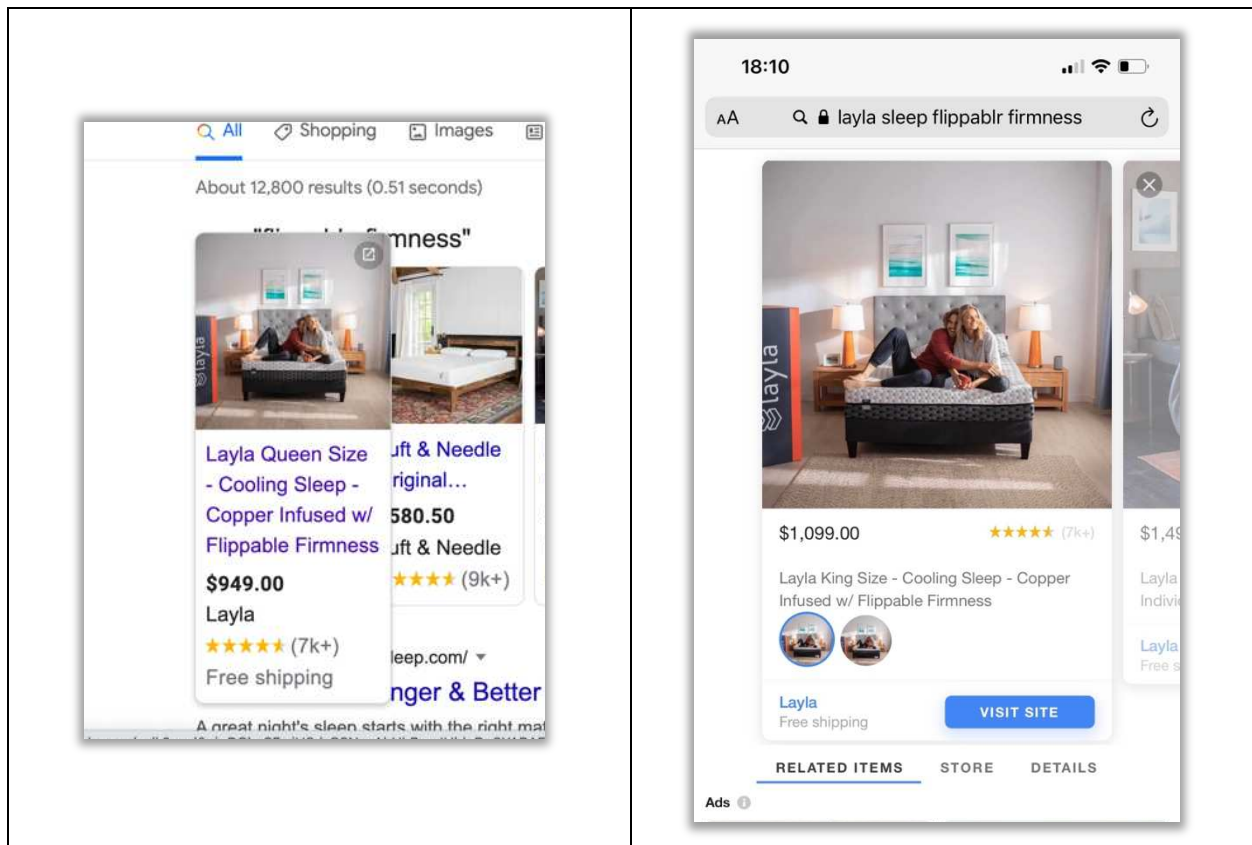
which creates in the mind of the purchaser an association between the mark and the service activity.” *In re Johnson Controls, Inc.*, 33 USPQ2d 1318, 1320 (TTAB 1994). Whether a mark sought to be registered as a service mark has been used “to identify” the services identified in the application is a question of fact to be determined on the basis of the specimens submitted by the applicant, together with any other evidence of record. *In re Adair*, 45 USPQ2d 1211, 1214 (TTAB 1997).

Both precedent and examination guidance make clear that in assessing the specimens, consideration must be given not only to the information provided by the specimen itself, but also to any explanations offered by Applicant clarifying the nature, content, or context of use of the specimen that are consistent with what the specimen itself shows. See *In re Pitney Bowes, Inc.*, 125 USPQ2d 1417, 1420 (TTAB 2018); *In re DSM Pharms., Inc.*, 87 USPQ2d 1623, 1626 (TTAB 2008) (“In determining whether a specimen is acceptable evidence of service mark use, we may consider applicant’s explanations as to how the specimen is used, along with any other available evidence in the record that shows how the mark is actually used.”); *see also* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1301.04 (July 2021) (“[A] specimen description submitted by the applicant typically helps clarify the manner in which the mark is used in commerce, and the more explanation the applicant provides initially, the more helpful it is to the examining attorney’s analysis. Thus, applicants are encouraged to provide a specimen description and explain how the applicant renders or provides the services ...”).

V. ARGUMENT

A. There is a Direct Association Between FLIPPABLE FIRMNESS and the Online Retail Services in the Substitute Specimen.

The substitute specimen, shown below, is a sponsored Google advertisement for the Applicant’s Online Retail Store. The advertisement displays the FLIPPABLE FIRMNESS mark in a manner such that potential purchases would perceive some direct association between the offer of online retail stores services and the FLIPPABLE FIRMNESS mark.



Layla purchased the ads in the substitute specimen to be displayed in response to a search for FLIPPABLE FIRMNESS. When a user searches for FLIPPABLE FIRMNESS, Google prominently displays Layla's sponsored ad in the search result. Layla controls the content shown in the display ad. As shown in the examples, Layla includes a picture of a mattress, and a bed-frame or foundation, and the trademark FLIPPABLE FIRMNESS. The advertisement includes a link to Layla's online retail store that the user can access by simply clicking on the sponsored ad.

The image on the left is a screenshot from Google.com on August 29, 2021 captured using window capture function on macOS Big Sur. The screen shot shows an advertisement, namely a Google Display Ad sponsored by Layla Sleep, Inc. The Display ad links to Layla Sleep, Inc.'s online retail store featuring mattresses and bed frames at www.laylasleep.com.

The second substitute specimen is a screenshot from Google.com on August 29, 2021 captured using window capture function on OSx running Safari browser. The screen shot shows an advertisement, namely a Google Display Ad sponsored by Layla Sleep, Inc. The Display ad links to

Layla Sleep, Inc.'s online retail store at www.laylasleep.com.

First, potential purchases perceive FLIPPABLE FIRMNESS as a source identifier. The Examining Attorney does not contest this. The mark is prominently displayed on both Google Ads sponsored by the Applicant Layla Sleep. Each advertisement has approximately twelve words having similar size and font, including the term FLIPPABLE FIRMNESS.

Second, the advertisements show a direct association between the mark FLIPPABLE FIRMNESS and the Applicant's online retail store services. A direct association may be established textually, contextually, or logically. *See In re Universal Oil Prods. Co.*, 177 USPQ at 457. In this case, the advertisements are displayed to a potential customer operating a web browser through a desktop computer or a mobile phone. At a minimum, the potential customer has some base level of knowledge regarding how such advertisements function. Namely, that selecting the displayed link in a sponsor ad will navigate the browser to a website offering online retail store services. This consumer knowledge is itself sufficient to provide logical association between the mark and Class 35 services.

The substitute specimen rendered on the iPhone browser includes a button titled VISIT SITE. A potential customer understands that the term SITE refers to an online retail store services featuring bed frames, foundations, mattresses, pillows, toppers, and bed sheets.

There is nothing in the advertisement limiting the term FLIPPABLE FIRMNESS to mattresses. Instead, a potential consumer could logically conclude from the image of a mattress on a bed frame that the online retail store features a variety of bedding related products, including bed frames, foundations, mattresses, pillows, toppers, and bed sheets.

To the extent that there is any doubt about whether purchasers would perceive the mark as shown in the specimens as a display associated with the goods rather than as a service mark identifying the source of the retail store services, as with many other grounds of refusal, we think that such doubt should be resolved in favor of applicant. Cf. *In re In Over Our Heads Inc.*, 16 USPQ2d 1653 (TTAB 1990) (Section 2(a) scandalous and disparaging); *In re MC MC S.r.l.*, 88

USPQ2d 1378 (TTAB 2008) (Section 2(a) falsely suggests a connection); *In re DNI Holdings Ltd.*, 77 USPQ2d 1435 (TTAB 2005) (Section 2 generic); *In re Aid Laboratories, Inc.*, 221 USPQ 1215 (TTAB 1983)(Section 2(e)(1) merely descriptive); *In re International Taste Inc.*, 53 USPQ2d 1604 (TTAB 2000) (Section 2(e)(2) primarily geographically descriptive); *In re Benthin Management GmbH*, 37 USPQ2d 1332 (TTAB 1995) (Section 2(e)(4) primarily merely a surname).

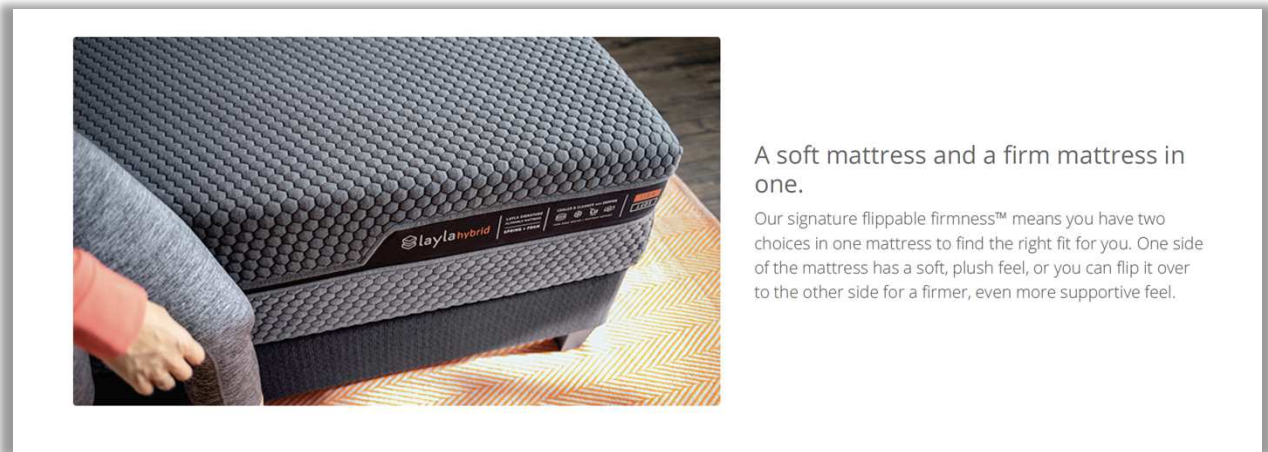
B. There is a Direct Association Between FLIPPABLE FIRMNESS and the Online Retail Services in the Original Specimen.

An ordinary consumer would perceive the original specimen as providing a direct association between the FLIPPABLE FIRMNESS mark and the online retail store services. The specimen includes the mark on a website for selling mattresses and related bedding products. The shopping cart button and purchase buttons are immediately adjacent to the mark. In short, the consumer would perceive a direct association from the mark and identified services from the specimen of record. In the alternative, the Applicant has submitted three substitute specimens.

The Applicant initially notes that the specimen must be evaluated as it is perceived by the consumer, and not through mechanical requirements of the Trademark Office. At the time the Applicant submitted the specimen, the Office required the URL of the webpage and the date of the screen capture to be included on the specimen. As was common practice, the applicant generated PDF print outs from the relevant portions of its webpage showing the mark in association with the applied for services. The Applicant submits that it is error to mechanically evaluate this printout of the specimen as the browser software invariably renders the graphics and text in a different format than as they appear on screen. In order to evaluate the specimen, one must consider how it is perceived by the consumer. In this case, it is viewed on a phone screen, tablet, or computer browser. In any of these cases, it becomes clear that the field of view is much narrower than the PDF printed generated by the browser. As a result, the use of the mark becomes much more prominent.

Below is a portion of the original specimen. This was submitted in the Substitute Specimen

section of the Request for Reconsideration, however it forms part of the original specimen rendered on browser operating on a handheld phone. This is what is typically viewed on a user's screen. A consumer viewing this specimen would make a direct association between the mark and the services.



The evidence of record confirms that consumers would perceive the mark used in the specimen as identifying the Applicant's service for selling online retail services featuring mattresses because this is what Layla does. Since being founded in 2016, Layla is exclusively an online retailer of mattresses and associated products. More specifically, Layla sells two types of mattresses, both of which are reversible and have dual firmness on opposing sides.

As set forth in TMEP 1301.04(f), the acceptability of a specimen is determined based on the facts and evidence of record, and viewed in the context of the relevant commercial environment. Thus, the information provided by the specimen itself, any explanations offered by the applicant clarifying the nature, content, or context of use of the specimen, and any other information in the record should be considered in the analysis.

In Exhibit A to the request for reconsideration, the Applicant has submitted an article that describes how consumers identify its online retail store services featuring mattresses with the FLIPPABLE FIRMNESS mark.

Exhibit C to the request for reconsideration is a third-party article from Newsweek regarding the Applicant. The article includes general information about the Applicant, including information that is relevant to how consumers perceive the website. The article explains that Layla makes two mattresses: The Layla Memory Foam mattress and the Layla Hybrid both have one side offering medium support (four) and the other medium-firm (seven). The article further explains that you can only buy a Layla mattress online directly through the website.

Exhibit B the request for reconsideration includes additional screen shots that show the webpage rendering on a browser. It is important to note that in these examples, as with the specimen of record, an Add to Cart button for the type of mattress is continuously available at the top of the page regardless of the scrolling of the consumer. Thus, when a consumer view the mark in the content of the live specimen, the add to cart button and other shop buttons are immediately available, forming a direction association in the mind of the consumer between the mark and the services.

As discussed above, the number of pages in the specimen are irrelevant because consumers perceive what is visible on the screen, and not what is, or was required at the time, to satisfy the specimen requirements. The mark is not buried in the specimen. The Examiner fails to provide any legal support for his contention that the mark must be prominently featured at the top of the webpage for the consumer to perceive a direct association between the mark and the website related services.

In re Johnson decision is distinguishable. In that case, the Board considered whether a trademark on a piece of hardware could also serve as a specimen for services for customer designing that piece of hardware. In rejecting the specimen, the Board stated that:

The crux of our analysis is that a purchaser or prospective purchaser of applicant's stated service, which is making these goods upon request to the specification of its customers, would view the mark on the labels attached to the packages in which the valves are shipped as simply a trademark for the valves, identifying their source and distinguishing them from similar products manufactured by other

businesses. There would be no reason for any reasonable person to suspect that a custom manufacturing service is being identified by the mark as it is used on these labels

The present case is distinguished from *Johnson* because the current specimen provides a multitude of reasons to suspect that online retail store services are being identified by the mark as used on the specimen. For example, the mark is provided on an online retail store where the user can buy the mattress. A purchase button is immediately available to the user. The Applicant only sells mattresses and consumers know this. For this reason, the *Johnson* precedent and the associated reasoning set forth by the Examiner regarding lack of a direct association must be set aside.

The Examiner has failed to cite any support for the proposition that “merely placing the mark on a website does not automatically mean the mark is used for the site. Thus, in this case, the specimen does not show the mark being used in association with an online retail store.” In this case, the association must be evaluated in the context of the consumer. From this perspective, it is clear that there is a direct association between the mark and the services.

The Examiner incorrectly argues that registration must be refused because the specimen shows the mark is used only to promote goods rather than the identified services. The Lanham Act does not require “promotion” as a prerequisite for use in commerce of a good or a service.

The principal register confirms that the consuming public perceives the Applicant’s use of FLIPPABLE FIRMNESS in the specimen as making a direct association between the mark and the services in class 35.

C. Third Party Registrations Confirm that Consumers Will Perceive A Direct Association Between the Mark and Retail Services.

The principal register confirms that the consuming public perceives the Applicant’s use of the FLIPPABLE FIRMNESS service mark in the original specimen as making a direct association between the mark and the services in class 35. In addition, the evidence confirms that online retailers routinely register service marks that are distinct and separate from their trade names and that ordinary consumers in this field are accustomed to identifying the source of a retailer based on a service mark that is distinct from the retailer’s trade name.

The Non-Final Office Action dated March 1, 2020, the Examiner cited registrations of Applicant's competitors for online retail services to support proposition that "marks for online retail stores see typical mark usage for the store at the top of the webpage (whether in the top left corner, or across the top center). The registrations fail to support conclusion that all registrations for online retail services must be in line with these hand-picked registrations. In fact, even a cursory review of the principal register confirms that the Examiner's proposed rule of law regarding mark placement is unfounded. More importantly, though, it confirms that consumers will perceive the Applicant's original specimen and substitute as associating the FLIPPABLE FIRMNESS mark with online retail store services featuring mattresses.

Before addressing the evidence of record, the Applicant initially notes, as it did in the response to the Office Action, that the third-party marks identified by the Examiner are of little assistance. Notably, "[i]t has been said many times that each case must be decided on its own facts." *In re Eagle Crest*, 96 USPQ2d at 1229 (citation omitted). The Board must make its own findings of fact, and that duty may not be delegated by adopting the conclusions reached by an examining attorney in another application. *In re Sunmarks, Inc.*, 32 USPQ2d 1470, 1472 (TTAB 1994); *In re BankAmerica Corp.*, 231 USPQ 873, 876 (TTAB 1986). The Board must assess each mark on its own facts and record. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ("Even if some prior registrations had some characteristics similar to [applicant's] application, the PTO's allowance of such prior registrations does not bind the Board or this court.").

Nevertheless, in the interest of providing the Board with a fair and complete record, the Applicant identifies several registrations that it discovered in a cursory review of the register. The Applicant has included eight examples in Exhibit E to its Request for Reconsideration that show specimens for marks for online retail services featuring mattresses, wherein the mark is NOT on the top of the webpage in the left corner or top center. These registrations, and associated specimens, further confirm that the ordinary consumer in the field is accustomed to

recognize a service mark as a source identified that that is distinct from a simultaneously displayed trade name.

WE CHARGE WHAT WE NEED, NOT WHAT WE CAN

Owner: TUFT & NEEDLE, LLC

Services: Online retail store services featuring mattresses.

Specimen: The specimen accepted by the Office appears to be a portion of the Tuft & Needle website displayed the TUFT & NEEDLE trade name wherein a chart comparison of mattress prices is shown. The mark is included on the specimen in small font below chart. The mark is not on the top of the webpage and is displayed simultaneously with the trade name TUFT & NEEDLE.

WAKE UP BETTER

Owner: TUFT & NEEDLE, LLC

Services: Retail store services selling mattresses, furniture, and bedroom-related products; Online retail store services selling mattresses.

Specimen: The specimen appears to be a product page for the PERCALE SHEET. At the very bottom of the page, in small font and buried in text, the mark is included. The mark is not on the top of the webpage and is displayed simultaneously with the trade name TUFT & NEEDLE.

A NEW DAY IN SLEEP

Owner: Casper Sleep Inc.

Services: Retail store services featuring beds, bed sheets and linens, pillow cases, blankets, mattresses, pillows, bolsters, feather beds, futon mattresses, mattress cushions, mattress foundations, mattress toppers and box springs.

Specimen: The statement of use describes the specimen as “a snap-shot displaying use of the mark.” The snap-shot appears to show a portion of a

webpage. The mark is not on the top of the webpage and is displayed simultaneously with the trade name TUFT & NEEDLE.

EVERLASTING WARRANTY

Owner: IDLE GROUP, LLC

Services: Retail store services and online retail store services featuring mattresses and beds.

Specimen: A screen capture of a product page for the a HAVEN branded mattress. The mark is not on the top of the webpage and it is displayed simultaneously with the trade name.

WORK HARD SLEEP HARD

Owner: Texas App Saver LLC

Services: Retail store and online retail store services featuring home furniture, beds, mattresses.

Specimen: The specimen is a webpage that shows the mark on the right hand side of the webpage. The mark is not on the top of the webpage and it is displayed simultaneously with the trade name.

WARRANTY WITHOUT END

Owner: IDLE GROUP, LLC

Services: Retail store services and online retail store services featuring mattresses and beds.

Specimen: A screen capture of a product page for the a IDLE PLUSH branded mattress. The mark is not on the top of the webpage and it is displayed simultaneously with the trade name.

I'D SLEEP THAT

Owner: Texas App Saver, LLC

Services: Retail store and online retail store services featuring home furniture, beds, mattresses, box springs, mattress foundations, bed frames,

mattresses, mattress protectors, pillows, bedding, grills and grilling accessories.

Specimen: A screen capture of a homepage for the Mattressville. The mark is not on the top of the webpage and it is displayed simultaneously with the trade name.

JUST RIGHT

Registrant: W.S. Badcock Corp

Services: Retail store services featuring furniture, mattresses, bedding, and home décor; On-line retail store services featuring furniture, mattresses, bedding and home décor and it is displayed simultaneously with the trade name..

Description of Specimen: A screen capture of a homepage mattress company. The mark is not on the top of the webpage and it is displayed simultaneously with the trade name.

VI. CONCLUSION.

For the foregoing reasons, Applicant respectfully requests that the Board reverse the Examining Attorney's refusal and approve Applicant's application for publication.

Respectfully submitted,
Layla Sleep, Inc.

November 22, 2021

/ Walter B. Welsh /
Walter B. Welsh
WELSH IP LAW LLC
PO Box 1267
Darien, CT 06820
Tel. (203) 321-6303
Email: walter@welshiplaw.com
trademark@welshiplaw.com

ATTORNEY FOR APPLICANT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant : Layla Sleep, Inc.
Trademark : FLIPPABLE FIRMNESS
Serial No. : 88359361
Filing Date : March 27, 2019
Attorney : Monica R. Reid
Docket : 2.00020

Commissioner for Trademarks
Post Office Box 1451
Alexandria, VA 22313-1450

DECLARATION IN SUPPORT OF APPLICATION

I, Gregg Dean, hereby declare and state as follows:

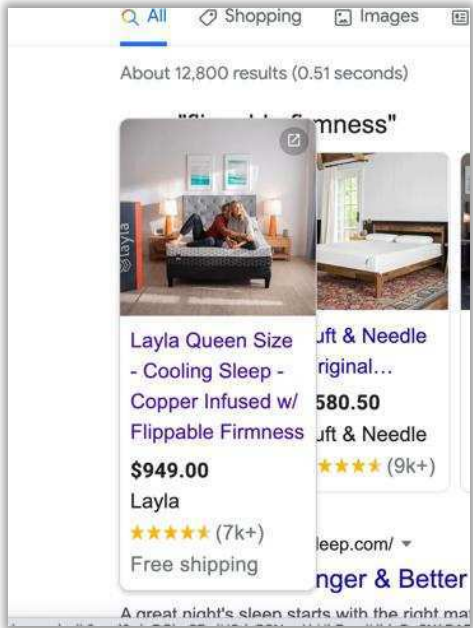
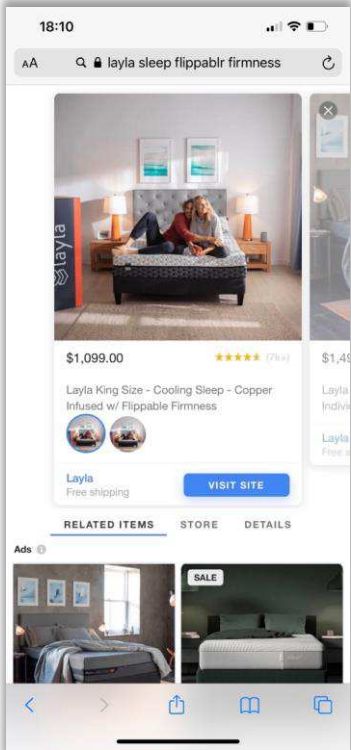
1. I am the chief executive officer of Layla Sleep, Inc. (hereinafter “Defendant” or “Layla”).
2. The facts set forth below are based on my own knowledge and records kept in the ordinary course of business by Layla.
3. I am a California resident.
4. I co-founded Layla in 2016.
5. Layla is a direct-to-consumer e-commerce company that sells mattresses and related products through its online retail store at www.laylasleep.com (“Layla Online Retail Store”) and through Amazon.
6. Layla does not have a physical store or any other location where customers can view or purchase its products.
7. The Layla Online Retail Store is an online retail store that features Layla

products. By using the services available from the Layla Online Retail Store a customer can shop and purchase mattresses and related products.

8. Layla regularly advertises for the Layla Online Retail Store by placing paid advertisements that feature the term FLIPPABLE FIRMNESS through Google, Facebook, and other websites.

9. Since at least January 1, 2020, Layla has prominently featured the FLIPPABLE FIRMNESS mark in Google paid advertising for the Layla Online Retail Store and associated services. The mark FLIPPABLE FIRMNESS is prominently feature in Layla’s sponsored paid advertising through Google.

10. Examples of this paid advertising featuring the FLIPPABLE FIRMNESS mark for the Applicant’s online retail store services was provided in the verified substitute specimen of September 1, 2021. Portiond of that specimen are shown below.


Desktop	iPhone
 A screenshot of a desktop Google search result. The search bar shows 'All', 'Shopping', and 'Images' tabs. Below the search bar, it says 'About 12,800 results (0.51 seconds)'. The main result is for 'Layla Queen Size - Cooling Sleep - Copper Infused w/ Flippable Firmness'. It features an image of a queen-sized bed with a person lying on it. The price is listed as '\$949.00'. There are five stars and '(7k+)' reviews. The text 'Free shipping' is visible at the bottom of the result card.	 A screenshot of an iPhone search result. The status bar at the top shows the time '18:10' and signal strength. The search bar contains 'layla sleep flippabl firmness'. The main result is for 'Layla King Size - Cooling Sleep - Copper Infused w/ Flippable Firmness'. It features an image of a king-sized bed with a person lying on it. The price is listed as '\$1,099.00'. There are five stars and '(7k+)' reviews. A 'VISIT SITE' button is visible. Below the main result, there are 'RELATED ITEMS' and 'STORE' sections.

11. Layla Sleep purchases advertisements from Google, and other companies such as Facebook. Layla purchased the ads in the substitute specimen to be displayed in response to a search for FLIPPABLE FIRMNESS. When a user searches for FLIPPABLE FIRMNESS, Google prominently displays Layla's sponsored add in the search result. Layla controls the content shown in the display add. As shown in the examples, Layla includes a picture of a mattress and the trademark FLIPPABLE FIRMNESS. The advertisement includes a link to Layla's online retail store that the user can access by simply clicking on the sponsored ad.

12. Layla has been using the FLIPPABLE FIRMNESS mark in ad titles and copy at least as early as January 1, 2020. Enclosed is a screenshot of our Google Ads account from 1/1/2020 to 9/30/2020 filtered for the term "flippable firmness". Some show the term in the title, others have it in the body of the ad. These are search ads only, we have proof of image and video ads as well from both Google and Facebook.

I hereby declare that all statements made herein of my own knowledge are true, and that all statements made on my information and belief are believed to be true; further that the statements were made with the knowledge that willful and false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of my application or any patent issued thereon.

11/22/2021
Date



Gregg Dean
Chief Executive Officer
Layla Sleep, Inc.

Exhibit A

